Editor's note: 83 I.D. 542; Appealed -- remanded due to passage of FLPMA, Civ. No. 76-668-B (D.N.M. June 2, 1978)

HAT RANCH, INC.

IBLA 75-370 Decided November 4, 1976

Appeal from decision of Administrative Law Judge Robert W. Mesch requiring the Bureau of Land Management to issue Hat Ranch, Inc., two 10-year grazing renewal permits (NM 3-74-1).

Reversed and remanded.

1. Administrative Authority: Generally -- Grazing Permits and Licenses: Cancellation or Reduction -- Grazing Permits and Licenses: Generally

A grazing permittee under section 3 of the Taylor Grazing Act does not have an absolute right to a permit renewal even though denial thereof will impair the value of his grazing unit which is pledged as security for a bona fide loan. The Department may refuse to renew such a permit when the public

interest requires that the subject land be preserved from unnecessary injury, exchanged, disposed of, or reclassified for alternate public use. Similarly, if the Department may deny renewal outright under the above circumstances, the Department may renew such a permit for a lesser term than previously allowed pending completion of a Management Framework Plan and an Allotment Management Plan which are oriented not only to livestock grazing, but also to multiple use management which includes such concerns as land and water conservation, environmental protection, and other resource management objectives which can be achieved by reclassification of national resource lands and manipulation of grazing activity.

2. Grazing Permits and Licenses: Generally -- Words and Phrases

"Such permit" as used in section 3 of the Taylor Grazing Act, 43 U.S.C. § 315b (1970), providing for a renewal of a grazing permit

does not mean only a permit identical with the terms and provisions of the original.

3. Grazing Permits and Licenses: Generally -- National Environmental Policy Act of 1969: Environmental Statements

Where by final judgment a court has ordered that until an appropriate environmental impact statement is issued the BLM will issue authorization for livestock grazing only on an annual basis, a grazing permit can be renewed for only one year, even though the grazing unit has been pledged as security for a bona fide loan.

APPEARANCES: Lewis C. Cox, Jr., Esq. and Harold L. Hensley, Jr., Esq., of Hinkle, Bondurant, Cox & Eaton, Roswell, New Mexico for appellee; James A. Coda, Esq., and Gail L. Achterman, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for appellant.

OPINION BY ADMINISTRATIVE JUDGE RITVO

The Bureau of Land Management (BLM) has appealed from a decision of Administrative Law Judge Robert W. Mesch, dated February 3, 1975, which held that section 3 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315b (1970), required the BLM to renew appellee's 10-year grazing permits for an identical period of 10 years because the original permits were pledged as security for a bona fide loan, and denial of 10-year renewals would impair the value of the grazing unit. The Judge also found no justifiable reason for denying the permittee's 10-year permit renewal request.

The pertinent portion of section 3 of the Taylor Grazing Act reads as follows:

> That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock * * *. * * * Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them * * *.
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> * * * [N]o permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject

> to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. * * * So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interests, or estate in or to the lands. (Emphasis added).

Pursuant to the provisions of the Taylor Grazing Act, supra, Hat Ranch, Inc., acquired two 10-year grazing permits for a period covering March 1, 1964, to February 28, 1974. The permits had been pledged as security for loans amounting to $ 250,000 from the Federal Land Bank Association of Las Cruces, New Mexico, and the Security Bank and Trust Company of Alamogordo, New Mexico.

On December 5, 1973, the District Manager, BLM, Las Cruces, New Mexico, received a renewal application from appellee requesting new 10-year permits so that it could again pledge the same as collateral with its financial institutions. The Advisory Board of New Mexico Grazing District No. 3 recommended that Hat Ranch's permits be renewed as applied, namely, for a 10-year period. The District Manager, however, by proposed decision dated February 15, 1975, determined that term permits for a period of 10 years should be denied, and that pending completion of the Management Framework Plan for the Mesa Planning Unit, term permits for a period of 3 years

should be issued instead. The District Manager added that upon completion of the Management Framework Plan, a grazing management system would be implemented for appellee's allotment. He then stated the following:

> The reasons for my proposed decision are as follows:
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> 1. The law and the regulations allow for discretion in the issuance of term permits (43 CFR 4111.3-2(b), 4115.2-1(c) and 4115.2-6(b)). Authorizations for livestock use should be on a short term basis until such time as the public resources have been inventoried and the use demands and conflicts known. The general public, in whose trust BLM manages the land, has a right to participate in formulating future plans. Livestock grazing is the most widespread use, and grazing exerts a significant influence on resource conditions of the public lands. Term permits that are not tied to proper resource planning may not provide for other public land management considerations. Upon completion of the management framework plan for the Mesa Planning Unit we will be in a position of providing for all public land management considerations.
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> 2. It is a long term goal and objective of the Bureau's range program to obtain livestock grazing management on all public lands where grazing is involved and where retention of Federal ownership and multiple use management is expected. Grazing systems which provide a specific sequence of livestock grazing by designated areas are designed to accomplish these management objectives. (43 CFR 4110.0-5(v)). These multiple use objectives which are identified through multiple use planning will include improvement in resource condition and enhancement of environmental values.
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> There is an ever increasing public awareness and interest in protecting all resources of the public lands. Therefore it is necessary that we assure that

we are on the right course before long term grazing permits are issued.

Thereafter, pursuant to 43 CFR 4115.2-1(b), appellee filed a protest against the BLM's proposed decision. By decision dated March 22, 1974, the District Manager reaffirmed his earlier decision for the reasons stated above. Pursuant to 43 CFR 4115.2-3, Hat Ranch, Inc., appealed from the decision of the District Manager and requested a hearing before an Administrative Law Judge. In its prehearing brief, appellee basically argued that the provision in section 3 of the Act concerning grazing privileges pledged as security for loans required the BLM to renew a 10-year permit for an identical 10-year term if the original permit had been pledged as security for a bona fide loan and if denial of renewal for the 10-year period would impair the value of the permittee's grazing unit.

A hearing on the matter was held in Las Cruces, New Mexico, on October 23, 1974. Thereafter, on February 3, 1975, Judge Mesch issued his decision wherein he held the following: (a) the issuance of a 3-year permit in lieu of a 10-year permit does not constitute a renewal of "such permit" within the contemplation of section 3 of the Taylor Grazing Act (Dec. at 3); (b) a grazing permittee does not have an absolute right to a

10-year renewal of a permit even if a denial thereof will impair the value of the grazing unit and the original permit is pledged as security for bona fide loans (Dec. at 3, citing Charles H. McChesney, 65 I.D. 231 (1958)); (c) while the Department has discretion with respect to permit renewal, there was no justifiable reason for the denial of appellee's request for 10-year renewal permits and, therefore, the action of the District Manager was arbitrary and capricious (Dec. at 7); and (d) the refusal to renew the 10-year permits for an additional 10-year period impairs the value of appellee's grazing unit (Dec. at 12). 1/ Judge Mesch then ordered that the case be remanded to the District Manager for the issuance of 10-year grazing permits pursuant to appellee's renewal application. 2/ The Bureau of Land Management appealed from this decision.

In its statement of reasons on appeal, the Government presents three issues for our consideration. (1) Does section

1/ In his decision at 7, n. 2, Judge Mesch stated that:

"It might be argued that it is not necessary to even consider this question [of whether the refusal to renew the 10-year permits for a period of 10 years impairs the value of the appellee's grazing unit which is pledged as security for bona fide loans] inasmuch as a permittee has a preference right of renewal in the discretion of the Secretary and if there is no justifiable reason for a denial of a request for renewal, then the permit should be renewed even if there is no showing that a failure to renew will impair the value of the grazing unit pledged as security for a loan."

2/ Pending the outcome of this appeal, Hat Ranch, Inc., is grazing livestock on national resource lands under annual licenses.

3 of the Taylor Grazing Act require that 10-year grazing permits be renewed for a full 10-year term when the permits are pledged as security for bona fide loans and denial will impair the value of the grazing unit? (2) Was there a justifiable reason for the District Manager to renew the applicant's permits for 3 years rather than 10? And (3) did the refusal to renew the applicant's permits for 10 years significantly impair the value of the permittee's grazing unit as security for bona fide loans?

[1] To begin with, we note our agreement with Judge Mesch's conclusion that a permittee who has pledged his permit as security for a bona fide loan does not have an absolute right to a renewal even though denial thereof will impair the value of the grazing unit. 3/ The pertinent provision of section 3 was first discussed by the Department in Alford Roos, 57 I.D. 8 (1938), where the Department held that issuance of a grazing license 4/ to one whose

3/ In its appeal brief, the appellee still maintains that section 3 of the Taylor Grazing Act requires that grazing permits pledged as security for bona fide loans must be renewed, "as a matter of right" for an identical term as previously allowed if the denial thereof will impair the value of the grazing unit (Brief at 5).

4/ Licenses are issued under section 2 of the Taylor Grazing Act, as amended, 43 U.S.C. § 315a (1970). For a discussion of the privileges and distinctions respecting licenses and permits, see United States v. Fuller, 409 U.S. 488 (1973); Brooks v. DeWar, 313 U.S. 354 (1941); United States v. Cox, 190 F.2d 293 (10th Cir. 1951); Osborne v. United States, 145 F.2d 892 (9th Cir. 1944); United States v. Maher, 5 IBLA 209, 79 I.D. 109 (1972); E. L. Cord, dba El Jiggs Ranch, 64 I.D. 232 (1957); Frank Halls, 62 I.D. 344 (1955); Solicitor's Opinion, 59 I.D. 340 (1946).

livestock unit was pledged as security for a bona fide loan did not bar adjustment of boundaries of grazing districts resulting in eliminating some of the lands under the license even though such action would prevent the renewal of the license with respect to the eliminated area. By way of dictum, the decision implied that the result might have been different if a permit had been issued, but the distinction was not developed and the decision closed instead with the following (57 I.D. at 10-11):

> Even though it were true that the above-quoted provision of section 3 ["pledged as security" clause] did prohibit the action complained of and the renewal of a license to Roos were mandatory, there is nothing to assure him of the renewal of his license on the identical lands heretofore allotted to him.
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> The case does not require an answer to the question of whether there could be an adjustment of the boundaries of a grazing district so as to eliminate therefrom the lands allotted under a permit * * * where the livestock unit dependent on the allotment is pledged as security for a bona fide loan. (Emphasis in original).

In Charles H. McChesney, supra, the BLM awarded the appellant fewer renewal grazing privileges than the amount for which he applied, based upon a BLM reexamination of the carrying capacity of the Federal range and the commensurability of appellant's base property. The appellant argued that since he had complied with the applicable rules and regulations of the Department, and his Federal grazing rights had been used to partially secure $ 580,000

of bona fide loans, the BLM could not refuse to fully renew his grazing privileges. While the appellant was actually applying for licenses instead of permits, and no showing had been made that refusal would impair the value of the grazing unit as collateral, the opinion nonetheless went on to state (65 I.D. at 237):

> When the provision in question is read, as it must be, in conjunction with the other provisions of the act, it is clear that a permittee whose grazing unit is pledged as security has no absolute right to have a permit renewed. A grazing permit is not a guarantee that Federal range for grazing a specified number of livestock will be available over a period of time. Range land which is covered by a permit granting exclusive grazing privileges may be exchanged under section 8 of the act (43 U.S.C., 1952 ed. sec. 315g); it may be classified under section 7 of the act * * * for any other use than grazing and disposed of in accordance with such classification under the applicable public land laws; and the establishment of grazing districts on the public domain is authorized by section 1 of the act "pending final disposal" of the public lands (43 U.S.C., 1952 ed. Supp. V. sec. 315). Consistently with these statutory provisions, the range code provides that a license or permit may be reduced proportionately to the reduction in grazing capacity caused by loss of the Federal range due to appropriation (43 CFR, 1954 Rev., 161.6 (e) (6) (Supp.)). The administration of section 2 of the act (43 U.S.C., 1952 ed., sec. 315a) which requires that the Secretary make provision for the protection and improvement of grazing districts, make rules and regulations to preserve the land from unnecessary injury, and provide for the orderly use, improvement, and development of the range may also limit the grazing privileges of any applicant (see 43 CFR, 1954, Rev., 161.6 (e) (5) (Supra)). (Footnote omitted.) (Emphasis added.)

The provision in question has also been construed by the courts. In LaRue v. Udall, 324 F.2d 428 (D.C. Cir. 1963), cert. denied,

376 U.S. 907 (1964), aff'g W. Dalton LaRue, Sr., 69 I.D. 120 (1962), holders of grazing permits on national resource lands challenged the Secretary's approval of an exchange of public grazing land for private land owned by a Government contractor in a transaction that would put the grazing land to industrial use for national defense purposes. At the Departmental level, the Secretary held that section 8(b) of the Taylor Grazing Act, as amended, 43 U.S.C. § 315g(b) (1970), authorized an exchange under the circumstances of the case. On appeal, the appellant for the first time raised the argument that the Secretary could not terminate the permits and effect the exchange because the permits had been pledged as security for bona fide loans. The Court responded as follows (324 F.2d at 431):

> Appellants also assert that their grazing unit has been and is pledged as security for bona fide loans, and that therefore the Secretary may not terminate their grazing permit. As a basis for the assertion they rely upon the ["pledged as security" clause in] * * * § 3 of the Taylor Grazing Act (43 U.S.C. § 315b):
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> * * * * * * *
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> Their contention is that if the Secretary may not refuse to renew a permit when the permittee's grazing unit is pledged as security for a bona fide loan, "he can hardly bring about the same result indirectly by terminating a permit prior to the expiration of the term * * *." As the context shows, the provision relied upon by the appellants is one of the factors to be considered by the Secretary in establishing preferences between conflicting applications for permits on the federal range. By no means should it be construed as providing that, by maintaining a lien on his grazing unit, a permittee may also create and

> maintain a vested interest therein which will prevent the United States from exchanging it under § 8(b). (Emphasis added.) [5/]

As the decisions above indicate, the Department may refuse to renew a permit, even though the permittee's grazing unit is pledged as security for a bona fide loan and denial will impair the value of the grazing unit, when the public interest requires that the subject land be preserved from unnecessary injury, exchanged, disposed of, or reclassified for alternate public use. Similarly, we conclude that if the Department may deny renewal outright under the above circumstances, it is no less reasonable to hold that the Department may renew a permit for a lesser term pending completion of a Management Framework Plan and an Allotment Management Plan which are oriented not only to livestock grazing, but also to multiple use management which includes such concerns as wildlife protection, water usage and conservation, environmental protection, and other resource management objectives which can be achieved by reclassification of national resource lands and control of grazing activity. See NRDC v. Morton, 388 F. Supp. 829 (D.D.C. 1974) (discussed infra); cf. Jerry Tecklin, 20 IBLA 308, 310 (1975); Grindstone Butte Project, 18 IBLA 16, 19 (1974). Furthermore, we

5/ The "pledged as security" clause was also noted, without elaboration, in Brooks v. DeWar, supra at 358; Mollohan v. Gray, 413 F.2d 349, 352 n. 4 (9th Cir. 1969); see also Joseph F. Livingston, A-22362 (December 18, 1939).

find our conclusion consistent with 43 CFR 4115.2-6(b) which reads in pertinent part as follows:

> Pledge of licenses and permits as security loans.
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> * * * * * * *
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> (b) A borrower-permittee desiring an extension of the term of his permit may file a request therefor, in writing, with the District Manager, setting forth the name of the lending agency, purpose and amount of loan, and the need for the extension of the permit term. When it appears that such extension will be in accordance with applicable law and regulation and not contrary to the public interest, the District Manager, in his discretion, may extend the permit for a period not to exceed 10 years from the date of the loan, subject to the rules and regulations then in force and to such additional terms and conditions as the District Manager may provide. * * * (Emphasis added.)

[2] We note also appellant's argument that the BLM never "denied the renewal" of grazing permits to Hat Ranch, Inc., as appellee was in fact offered 3-year permit renewals. The statutory clause immediately following the "pledged as security" clause reads: "Such permits shall be for a period of not more than ten years * * *." (Emphasis added.) The reference to ten years is clearly a ceiling measure, not an absolute, automatic privilege. See United States v. Swanson, 14 IBLA 158, 173, 81 I.D. 14, 21 (1974). Thus, at first glance it appears that the appellee secured renewal permits in conformance with the statute's requirements. However, despite such renewal, we are faced with Judge Mesch's

determination that once the Department chooses to exercise its discretion and renew a permit which is pledged as security for a bona fide loan, it must, in the absence of a justifiable reason for doing otherwise, issue a new permit having an identical term as the original. The Judge concluded (Dec. at 3):

> The District Manager asserts that the appellant has no cause for complaint because his decision provided that the permits would be renewed. I do not believe that a decision to issue a 3-year permit in lieu of a 10-year permit constitutes a renewal of "such permit" within the contemplation of Section 3 of the Act. The provision in Section 3 would be rendered meaningless if a 1-year permit or an annual license constituted the renewal of a 10-year permit.

We believe that Judge Mesch interpreted the meaning and scope of the pertinent section too narrowly, for when section 3 is examined as a whole it is clear that the term "such permit" is used interchangeably with the broader term "grazing permit" and does not carry the limiting construction attributed to it by the Judge. The word "such" means alike, similar, of that kind or class, and represents the general object as already particularized; it is a descriptive word referring to a previous antecedent. See C. J. Tower & Sons, Inc. v. United States, 295 F. Supp. 1104, 1108 (Cust. Ct. 1969); Rayonier, Inc. v. Polson, 400 F.2d 909, 919 n.11 (9th Cir. 1968). In section 3 of the Act, the word "such" is used numerous times with reference to grazing permits, and it consistently refers in the more general sense to grazing permits issued

in the discretion of the Secretary. In the specific clause recited by Judge Mesch, we find no basis for construing the language "such permit" to mean solely a renewal permit having identical features as the one previously issued. 6/

To demonstrate the difficulty with Judge Mesch's interpretation, one need only note that it leads to the conclusion that where the permittee has pledged his grazing unit as security for a bona fide loan, the Department would thereafter be restrained, despite public interest considerations, from altering any of the terms of a renewal permit such as the number of livestock to be grazed and the seasons of use. Such a construction of the Act would be in direct conflict with the statutory clause immediately following the "pledged as security" clause, which reads:

> Such permits shall be for a period of not more than ten years, subject to the preference right of the

6/ Both parties quote extensively from the Senate floor debate on the pertinent section of the bill. An amendment relating to permits pledged as security for bona fide loans was first introduced by Senator McCarran of Nevada. 1934 CONG. REC. 1151-52 (Vol. 78, Pt. 10, 73d Cong., 2d Sess). The subsequent Senate debate indicated that various Senators were concerned that the language of the amendment went too far as it could be construed to permit indefinite extension of a permit, beyond the period allowed by the permit, until the indebtedness was paid, and thus violated the purposes of the bill. Senator McCarran rejected the idea that the amendment should be so construed. 1934 CONG. REC. 1152-55 (Vol. 78, Pt 10, 73d Cong., 2d Sess). In response to the criticism, the language of the amendment was modified but the ambiguous language was not totally deleted.

> permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. (Emphasis added.)

See Charles H. McChesney, supra; cf. United States v. Maher, 5 IBLA 209, 79 I.D. 109 (1972). Furthermore, as specifically stated in Alford Roos, supra, even assuming the pertinent clause applied also to licenses, and the Department, in its discretion, renewed the license, there is nothing in the Act which assures the licensee the privilege of using identical lands theretofore allotted to him. See also, Thomas Ormachea, 73 I.D. 339 (1966). Analogously, we hold that the BLM may choose to renew a permit for an alternate term.

[3] The final question, then, is whether the decision to grant an alternative term of 3 years is reasonable and not arbitrary or capricious. Before we can undertake an independent analysis of that issue, we must consider the effect of the decision in National Resources Defense Council v. Morton, 388 F.Supp. 829, (D.D.C. (1974)), and the final judgment entered on June 18, 1975. The District Court determined that the Department had not fully complied with the provisions of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. (1970), because it continued issuing grazing privileges without preparation of adequate environmental land-use studies. The District Court Judge granted the plaintiff's motion for summary

judgment and directed the Government and plaintiffs to work together in seeking a mutually satisfactory schedule for the preparation of environmental impact statements (EIS) covering lands affected by livestock grazing programs. On June 18, 1975, the Court accepted an agreement tendered by the parties which provided for a BLM program to develop Management Framework Plans (MFP) which would describe general management guidelines for land-use decisions. Each MFP would include a number of Allotment Management Plans (AMP) which would provide, in detail, permissible livestock grazing activities and alternate uses for the Federal range. The order provided the following:

> 7. Each EIS (environmental impact statement) contemplated by the agreement will discuss in detail "livestock grazing activities" and all reasonable alternatives thereto. "Livestock grazing activities" as used in this Order shall mean all existing or proposed livestock grazing, all grazing use authorizations issued or contemplated to be issued by BLM as well as those substantial activities which are supportive of and related to livestock grazing administered by BLM, such as fencing, livestock water development, spraying, chaining, seeding, and brush removal.
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> 8. Until an appropriate EIS is completed, the Federal Defendants will adhere to the current policy of limiting authorizations for livestock grazing on any given area to an annual authorization basis, to the extent allowed by law. (Emphasis added.)

The court's recognition of present BLM policy, of issuing 1-year licenses, was expressed in NRDC v. Morton, supra, at 839 n. 18.

> Permits and leases for terms, generally 10 years, are made only after an AMP is agreed to between BLM and the grazer [sic]. The AMP is therefore a part of the term permit. In areas for which no AMP has been prepared only annual licenses are issued. (Emphasis added.)

In several recent cases the Board has recognized that the BLM is bound by the Court order of June 18, 1975, so long as it remains in effect. In one case the Board refused to cancel an outstanding permit on the grounds that it had been issued without complying with NEPA, supra, but it recognized that the Court's order controlled Departmental actions. Sidney Brooks, 22 IBLA 177 (1975). In a more recent case the Board held that application for renewal of a grazing lease which would have required road building and a well drilling for its utilization was properly denied until an acceptable environmental impact statement had been prepared pursuant to the Court's order. Robert H. Jones, 25 IBLA 93 (1976).

We also note in the Bureau's assessment of the NRDC decision in Instruction Memo. No. 75-407, August 22, 1974, the Director stated:

> Although the court order will require a substantial effort on the part of the Bureau's personnel, the order itself will have little impact on the ongoing range program as it relates to our grazing authorizations. The court action does not prohibit or alter the issuance of licenses or leases at this time. Current term permits and leases will continue uninterrupted; however, all renewals will be on an annual basis until the necessary EIS for the allotment or lease area has been completed

and a decision has been made concerning future livestock use on the area. * * *

Accordingly, we find that pursuant to the Court's order the Hat Ranch's grazing permits can be renewed only on an annual basis.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision below is reversed and the case remanded for action consistent with the views set forth above.

_____
Martin Ritvo
Administrative Judge

We concur:

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Frederick Fishman
Administrative Judge

_____
Douglas E. Henriques
Administrative Judge